

**United States Department of Labor
Employees' Compensation Appeals Board**

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J.R., Appellant)	
)	
and)	Docket No. 08-2374
)	Issued: March 6, 2009
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Carol Stream, IL, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from a July 23, 2008 decision of the Office of Workers' Compensation Programs which denied merit review. Because more than one year has elapsed between the most recent merit decision dated April 30, 2007 and the filing of this appeal on September 2, 2008, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On May 11, 1999 appellant, then a 44-year-old mail processor, filed a traumatic injury claim alleging that while sweeping mail at work her left knee locked and gave out on her. The Office accepted her claim for left knee strain and expanded her claim to include left later

meniscus tear and authorized arthroscopic surgery which was performed on July 20, 1999. Appellant stopped work on May 11, 1999 and worked intermittently thereafter.¹

Medical development of appellant's claim indicated that appellant's had three prior left knee surgeries. On July 20, 1999 Dr. Richard B. Ressler, a Board-certified orthopedist, performed a partial lateral meniscectomy and chondroplasty of the left medial femoral condyle and patella. He diagnosed tear of the left lateral meniscus, chondromalacia medial femoral condyle and patella. On April 20, 2000 appellant filed a claim for a schedule award. Dr. Ressler opined that appellant had 12 percent whole person impairment. An Office medical adviser reviewed Dr. Ressler's findings and determined that appellant had three percent impairment of the left leg. On August 18, 2000 the Office granted appellant a schedule award for three percent impairment of the left leg. On November 20, 2000 an Office hearing representative remanded the matter for further development. In a February 23, 2001 report, Dr. Julie M. Wehner, a Board-certified orthopedist and an Office referral physician, opined that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*) appellant had two percent impairment of the left leg. After an Office medical adviser concurred with Dr. Wehner, the Office, on April 12, 2001, denied appellant's request for an additional schedule award. Appellant subsequently submitted additional medical evidence and requested reconsideration. In a decision dated November 9, 2001, the Office denied modification of the prior decision.

On October 29, 2003 appellant noted an additional schedule award. Appellant submitted reports from Dr. Mitchell Goldflies, a Board-certified orthopedist, dated June 19 to July 9, 2002, who diagnosed lumbo-pelvic sprain and patello femoral compression syndrome of the left knee as a result of the work injury. Dr. Goldflies opined that appellant sustained 32 percent permanent impairment of the lower extremity. The Office referred Dr. Goldflies' report and the case record to the Office medical adviser who, in a report dated February 6, 2006, found that appellant had two percent impairment of the left lower extremity. In a decision dated August 31, 2006, the Office denied appellant's claim for a schedule award. Appellant requested an oral hearing which was held on February 14, 2007. She submitted a report from Dr. Bruce J. Montella, a Board-certified orthopedist, dated February 19, 2007, who noted a history of injury and opined that appellant had 20 percent whole person impairment.

In a decision dated April 30, 2007, the hearing representative affirmed the Office decision dated August 31, 2006, finding that the medical evidence did not support that appellant was entitled to an additional schedule award.

Subsequent to the hearing representative's decision, appellant submitted an August 18, 2004 chest x-ray report from Dr. Mark Jundanian.

¹ The record reflects that appellant also filed a claim for an injury on September 12, 1991 which was accepted for left ankle sprain, internal derangement of the left knee, right shoulder sprain and lateral meniscus tear of the left knee and underwent arthroscopic surgery on June 14, 1993 and August 22, 1997.

² A.M.A., *Guides* (5th ed. 2001).

On April 23, 2008 appellant requested reconsideration. She indicated that a medical report would be forthcoming. In a similar letter dated April 23, 2008, appellant requested reconsideration and indicated that a medical report addressing a schedule award would be submitted in a few days. No additional evidence was received.

By decision dated July 23, 2008, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

Appellant's April 23, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

Appellant did not submit any additional relevant evidence with her reconsideration request only two narrative statements which advised that she would submit a medical report addressing her schedule award within a few days. However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered. Therefore, the Office properly determined that this

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.608(b).

evidence did not constitute a basis for reopening the case for a merit review. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any relevant new evidence with her reconsideration request. She submitted an August 18, 2004 chest x-ray report but this is not relevant as it does not address permanent impairment of appellant's left leg. Although appellant indicated that new evidence was forthcoming, no additional evidence was received prior to the July 23, 2008 decision. The Office's April 30, 2007 decision denied an additional schedule award because there was no medical evidence supporting a higher impairment rating. Thus, the underlying issue is medical in nature. But, as noted above, appellant did not submit any new and relevant medical evidence with her reconsideration request.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her April 23, 2008 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board